

COMMUNICATION FROM AUSTRALIA

Negotiating Proposal for Legal Services

The following communication has been received from the delegation of Australia with the request that it be circulated to the Members of the Council for Trade in Services.

1. This paper sets out a negotiating proposal from Australia for the legal services sector. Australia reserves the right to submit further and more detailed proposals on this sector at a later date.

I. IMPORTANCE OF TRADE LIBERALISATION IN THE SECTOR

2. Legal services play a vital role in supporting and facilitating business and form a critical part of the infrastructure that underpins transactions in the commercial world. It is scarcely possible to contemplate conducting business transactions, particularly those of a transnational nature, in a legal vacuum. Legal firms around the world are internationalising as their clients pursue opportunities in a rapidly globalising marketplace and demand a consistent level of service across multiple jurisdictions. The importance to international trade and investment of a regulatory framework that facilitates the ready provision of transnational legal services and service suppliers cannot be overstated.

3. Legal firms not only establish a commercial presence in overseas markets, but lawyers also increasingly engage in short-term "fly-in, fly-out" assignments, and e-commerce provides the potential for greater crossborder supply.

4. Australia has consistently argued within the WTO the importance of liberalising trade in legal services. Not only would such liberalisation improve opportunities for legal service providers, but it would also facilitate access by businesses, particularly those operating across different jurisdictions, to a comprehensive range of legal services by a common provider. The current market access barriers in legal services serve as a hindrance to trade in other services - for example, when firms in other service areas are unable to gain access for their own legal advisers to foreign jurisdictions.

II. IMPEDIMENTS TO FURTHER LIBERALISATION

5. Australian exporters have identified a number of impediments to further liberalisation of the legal services sector. These include:

- restrictions or prohibitions on the establishment of foreign law firms;
- restrictions or limitations on joint ventures between local and foreign firms;

- restrictions on the practice of home-country law and third-country law;
- restrictions on employing local lawyers;
- restrictions on profit sharing by local and foreign firms;
- numerical ceilings on foreign lawyers;
- unreasonable restrictions on licensing;
- limited or no recognition of qualifications;
- lack of transparency in regulatory processes and systems;
- onerous visa procedures.

III. PROPOSAL

6. Consistent with proposals submitted as part of the WTO Information Exchange (July 1998), Australia believes that the following specific guiding principles are particularly relevant to achieving liberalisation of trade in legal services.

- (a) Formal recognition, on reasonable terms, of the right to practise home-country law, international law, and where qualified, third-country law, without the imposition of additional or different practice limitations by the host country (eg, a minimum number of years of professional experience or a refusal to recognise concurrent practice rights where the foreign lawyer's home country is a federal jurisdiction).
- (b) Formal recognition, on reasonable terms, of the right of foreign law firms to establish a commercial presence in a country or economy without quota or other limitations concerning professional and other staff, location, number and forms of commercial presence, and the name of the firm.
- (c) Formal recognition, on reasonable terms, of the right of foreign law firms and lawyers to enter freely into fee-sharing arrangements or other forms of professional or commercial association, including partnership with international and local law firms and lawyers.
- (d) The right to practise local law to be granted on the basis of knowledge, ability and professional fitness only, and this to be determined objectively and fairly through a transparent process.
- (e) Formal recognition of the right, on reasonable terms, of a foreign law firm to employ local lawyers and other staff.
- (f) Formal recognition of the right to prepare and appear in an international commercial arbitration.

7. Australia is of the view that the 'limited licensing' concept is an important element in meeting the requirements of law firms providing transnational legal services. It is a concept that embodies the idea that legal service providers need not be licensed to provide legal services covering the entire

body of law of a single jurisdiction or multiple jurisdictions, but only in areas in which they possess competence and/or qualifications.

8. As implied in principle (1) above, the limited licensing concept provides for regulators to recognise the separate existence of home-country, host-country, third-country and international law. This allows a limited licence to be issued enabling foreign lawyers to practise prescribed areas or aspects of host-country law (aspects that are incidental to the practice of foreign law) as well as home-country, third-country (where qualified) and international law. In such circumstances, foreign lawyers wishing to provide transnational legal services would not be compelled to obtain a full licence by undertaking the often burdensome process of fully qualifying in host-country law. The limited licensing approach, coupled with voluntary commercial associations between local and foreign lawyers/firms, creates a regulatory environment in which local and foreign lawyers/firms can engage in providing a wide range of transnational legal services to local and international clients.

9. Australia considers that nationality and residency requirements are trade-distorting barriers that should be eliminated. Consumer protection, ethical standards and quality of service, together with safeguarding the rule of law, should be achieved through other more appropriate, nondiscriminatory regulatory means.

10. Australia also considers that with further strengthening, the disciplines developed for the accountancy sector in 1998 by the Working Party on Professional Services (WTO document S/L/64) could be extended to the legal services sector. These disciplines represent a significant step forward in terms of improving the transparency of, and minimising the trade restrictiveness of, licensing procedures, technical standards and qualification recognition. However, Australia considers there is scope to tighten the disciplines, including by extending their reach to measures subject to scheduling under Articles XVI and XVII of the GATS.
